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Supreme Court, U.S.
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No. 97-1798

In The

Supreme Court of the United States

October Term, 1997

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., AND KEVIN F. HOBBS,

Petitioners,

v.

ESQ BUSINESS SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The California Supreme Court

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

SCOTT R. MOSKO
Counsel of Record
JED S. RITCHEY
HOGE, FENTON, JONES & APPEL, INC.
Sixty South Market Street
Suite 1400
San Jose, California 95113
(408) 287-9501
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. If the interstate commerce activities of a client require it to seek non-litigation legal services, may a state in which these activities occur prevent this non-resident client from using its counsel of choice?

2. Whether a state can prevent a client from retaining an out-of-state attorney in the arbitration of a contractual dispute that involves interstate commerce and is subject to the Federal Arbitration Act?

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INTRODUCTION

Respondent's Brief In Opposition concedes this Court has jurisdiction over this case and may review the second question presented. Respondent, however, urges the Court not to review the related interstate commerce issue in Petitioners' first question presented because the issue was not sufficiently raised in the lower courts.

As set forth below, this Court has jurisdiction and may review both questions presented. Petitioners sufficiently raised, and the California Supreme Court passed on, the interstate commerce issues inherent in both of the questions presented for review to this Court. Respondent also claims Petitioners lack standing to assert Commerce Clause rights for clients. Again, Respondent is wrong. Petitioners have suffered actual injury and, as attorneys, have standing to assert the rights of clients.

ARGUMENT

I. The Court Has Jurisdiction To Review This Case

A. This Court May Consider All The Interstate Commerce Issues Presented In The Petition As They Were Sufficiently Raised In The Lower Courts.

Respondent argues that Petitioners waived their Commerce Clause claims because they did not properly raise them in the state courts. In framing the federal question for presentation to the state court, however, the litigant is not bound to follow any particular form of words or phrases.

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential . . .

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). Moreover, this Court's jurisdiction "does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982). Therefore, even though Petitioners may not have explicitly cited Article I, section 8, clause 3 of the Constitution of the United States, the interstate commerce issues were nonetheless sufficiently raised and brought to the attention of the California courts.

Throughout the state court proceedings, Petitioners cited cases specifically dealing with the governance of lawyers involved in interstate law practice as they represent clients involved in interstate matters. Contrary to Respondent's claim (Respondent's Brief, p. 10), these cases directly implicate the Commerce Clause. In *Appell v. Reiner*, 43 N.J. 313 [204 A.2d 146] (1964), the Supreme Court of New Jersey stated that "recognition must be given to the numerous multi-state transactions arising in modern times" and that there may be instances "warranting the ignoring of state lines." *Id.* at 316. And in *Estate of Waring*, 47 N.J. 367 (1966), the New Jersey high court relied on the reasoning set forth in *Spivak v. Sachs*, 16 N.Y.2d 163 [211 N.E.2d 329] (1965):

> [C]hief Judge Desmond . . . [took note] of the danger that the law might improperly be stretched to outlaw customary and innocuous practices and recogniz[ed] that **New York could**

> **not properly penalize every instance in which an out-of-state lawyer comes into New York "for conferences or negotiations relating to a New York client and a transaction somehow tied to New York."**

Estate of Waring, 47 N.J. at 376 (citing *Spivak*, 16 N.Y.2d at 168) (emphasis added). By citing authority that holds a state cannot burden interstate commerce with overly restrictive unauthorized practice of law enforcement, Petitioners clearly implicated the Commerce Clause. Thus, these issues were adequately raised before the California Supreme Court.

Moreover, Petitioners' Reply to the State Bar's Amicus Brief before the California Supreme Court emphasized the interstate relationship of the parties and the international nature of the contract itself. Contrary to Respondent's claim, the interstate practice of law and the interstate nature of the underlying contract were discussed at oral argument before the California Supreme Court. Petitioners explicitly argued that representation of clients in matters involving interstate commerce should be exempted from the reach of Business and Professions Code section 6125.[1]

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[1] Respondent complains there is no evidence that these issues were discussed or considered by the court. Respondent's Brief 9 n.4. Were there such a record, it would show questions posed by Justice Ming Chin, the author of the opinion in question, inquiring how the court might deal with interstate law practice. Amicus California State Bar's counsel responded by suggesting a "personal jurisdiction type" analysis. Petitioners' counsel suggested an analysis dependent upon interstate commerce. Specifically, if the transaction or dispute in question impacted interstate commerce, then any party involved should

Arguments centered on interstate contracts and the multi-state practice of law by definition implicate the Commerce Clause. There is no requirement that petitioner expressly cite the exact text of the Constitution in the lower courts so long as the record shows by "clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497 (1981). In sum, the interstate commerce questions were sufficiently drawn into question and the California Supreme Court had a fair opportunity to address the federal questions that are now before this Court.

Indeed, where the highest state court considers and disposes of a federal issue, "it is irrelevant to inquire when a federal question was raised in a court below." *Orr v. Orr*, 440 U.S. 268, 274-275 (1979). "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436-437 (1959).

Although the California Supreme Court opinion does not expressly cite the Commerce Clause, it explicitly acknowledges the reality of interjurisdictional practice of law. App. 11. The court held that an out-of-state lawyer could violate Business and Professions Code section 6125 without even physically entering the State of California simply by advising a California client by telephone, fax, or computer. App. 10. The California Supreme Court recognized the "demands of business and the mobility of our society pose distinct problems in the regulation of the

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be free to select counsel of choice. Unless the venue of the dispute was a public tribunal, a party should not be forced to hire local counsel particularly when such party may have competent in-house counsel. Justice Chin and the majority of the California Supreme Court rejected petitioners' proposal.

practice of law." App. 11 (citing ABA Model Code of Professional Responsibility EC 3-9). Moreover, the court acknowledged "the need to accommodate the multi-state nature of law practice," but refused to apply the exception in this case. App. 21.

Clearly, multi-state law practice by definition constitutes interstate commerce. By expressly rejecting Petitioners' multi-state representation argument, the Court affirmatively decided whether or not Business and Professions Code section 6125 violated the Commerce Clause. The rejection of an argument based on impermissible barriers to interstate commerce, is unquestionably a rejection on the merits of the Commerce Clause issues presented in the Petition for Certiorari. It is inconceivable that the California Supreme Court's judgment was rendered without considering interstate commerce. The opinion demonstrates as much. Therefore, this Court may hear both questions presented.

Furthermore, even if this Court decides the interstate commerce issues were not sufficiently raised or passed on, it may still hear and decide them as this Court has treated the "so-called 'not pressed or passed upon below' rule as merely a prudential restriction." *Illinois v. Gates*, 462 U.S. 213, 219 (1983). In *Terminiello v. Chicago*, 337 U.S. 1 (1949) and *Vachon v. New Hampshire*, 414 U.S. 478 (1974), the Court reversed state criminal convictions on Constitutional grounds not urged in state court. In *Vachon*, this Court reaffirmed that it possessed discretion to ignore the failure to raise in state court the question on which it decided the case. *Vachon*, 414 U.S. at 479 n.3. "Though we do not normally decide issues not presented below, we are not precluded from doing so." *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

This Court also recognizes it often may be unclear whether the particular federal question presented in this Court was raised or passed upon below.

> [If] the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.

Illinois v. Gates, 462 U.S. 213, 220 (1983) (citing *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899)). In *Illinois v. Gates*, this Court stated that it will not attempt to "draw a clear-cut line between cases involving only an 'enlargement' of questions presented below and those involving entirely new questions." *Gates*, 462 U.S. at 220. In his concurring opinion in *Gates*, Justice White stated:

> We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below.

Gates, 462 U.S. at 248 (White, J., concurring). The Commerce Clause issues presented to this Court are not new questions, but are simply part of the multi-state practice of law and interstate commerce issues raised in the courts below. As set forth in the Petition and supporting amicus briefs, this case has great constitutional, legal and economic significance and should be reviewed by this Court.

B. This Court Has Jurisdiction As The California Supreme Court Considered And Ruled On The Federal Arbitration Act Issues.

There is no dispute that Petitioners' second question in the Petition for Writ of Certiorari was properly presented and passed on by the California Supreme Court. In its opinion, the court noted that "the FAA regulates arbitration that deals with maritime transactions and contracts involving the transportation of goods through interstate and foreign commerce," but disagreed with Petitioners' contention that it preempted California Business & Professions Code section 6125. App. 20. Because the California Supreme Court passed on this federal issue, this Court has jurisdiction of this case pursuant to 28 U.S.C. section 1257.

II. Petitioners Have Suffered Actual Injury And Have Standing To Assert These Claims.

Respondent claims that Petitioners lack standing. This assertion ignores the fact that Petitioners themselves have suffered actual injury from the final judgment of the California Supreme Court. The judgment precludes Petitioners from enforcing the fee agreement against Respondent for the legal services that they performed in California. App. 2-3. Petitioners meet all Article III standing requirements on their own and, as lawyers, may also challenge unconstitutional burdens to interstate commerce that injure their clients.

In order to establish the threshold actual case or controversy requirement imposed by Article III of the Constitution, "a litigant first must clearly demonstrate

that he has suffered an 'injury in fact.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). There is no doubt that Petitioners have suffered the requisite actual injury as they have been denied the right to collect certain fees. Thus, Petitioners have the requisite "personal stake in the outcome" that assures that "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Petitioners also satisfy the "causation" and "redressability" prongs under the Article III test as the loss of the right to recover their fees "can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38-41 (1976).

Petitioners, as attorneys, may also assert the rights of clients. *Department of Labor v. Triplett*, 494 U.S. 715, 720-21 (1990). This Court has allowed litigants to advance the constitutional rights of others when the litigant has suffered from some injury in fact to satisfy the Article III case or controversy requirement. *Caplin & Drysdale v. United States*, 491 U.S. 617, 624 n.3 (1989). As discussed above, Petitioners suffered actual injury from the California Supreme Court's judgment. Thus, Petitioners meet the first requirement for third-party standing.

A second, prudential inquiry generally looks at the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights, and the impact of the litigation on third-party interests. *Caplin & Drysdale v. United States*, 491 U.S. 617, 624 n.3 (1989). This Court, however, has held that an

obstacle to the rightholder's suit is not necessarily a prerequisite for third party standing. *Id.* In *Caplin & Drysdale*, this Court held that a lawyer had third-party standing to raise the Sixth Amendment rights of a client when challenging a statute that might have inhibited the client from paying attorney's fees. Id.[2]

This Court has recognized that the attorney-client relationship is "one of special consequence." *Id.* Contrary to Respondent's claim, an attorney can assert the rights of prospective clients.

> A restriction upon the fees a lawyer may charge that deprives the lawyer's **prospective client** of a due process right to obtain legal representation falls squarely with this [third party standing] principal.

Department of Labor v. Triplett, 494 U.S. 715, 720-21 (1990) (citing *Caplin & Drysdale v. United States*, 491 U.S. 617, 623 n.3 (1990)) (emphasis added). Moreover, this Court will grant third party standing in cases where:

> the enforcement of a restriction against a litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement).

Triplett, 494 U.S. at 720-21 (citing *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 954-958

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[2] The Court concluded that even though a criminal defendant suffers no serious obstacles to advancing his or her own claim, the other two factors weighed strongly enough for the lawyer to have standing. *Id.*

(1984)) (professional fundraiser given third-party standing to challenge statute limiting its commission to 25% as violation of clients' First Amendment right to hire him for a higher fee). Petitioners may properly assert their own rights and the rights of future clients because they are challenging a judgment that imposes unreasonable burdens on interstate commerce, a judgment that injures lawyers and clients alike.

CONCLUSION

This Court has jurisdiction over both questions presented for review and Petitioners have standing to assert their claims on their own behalf and on behalf of their clients. The petition for writ of certiorari should be granted.

Respectfully submitted,

SCOTT R. MOSKO
Counsel of Record
JED S. RITCHEY
HOGE, FENTON, JONES & APPEL, INC.
Sixty South Market Street
Suite 1400
San Jose, California 95113
(408) 287-9501
Attorneys for Petitioners